INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	7
Conclusion	11

CITATIONS

Cases:

Browder v. *United States*, 312 U. S. 335	10
Estep v. *United States*, Nos. 66 and 292, O. T. 1945, decided February 4, 1946	1, 7, 8, 9
Falbo v. *United States*, 320 U. S. 549	8, 10
Gates v. *United States*, 122 F. 2d 571, certiorari denied, 314 U. S. 698	11
United States v. *Illinois Central R. R. Co.*, 303 U. S. 239	10
United States v. *Rinko*, 147 F. 2d 1, certiorari denied, 325 U. S. 851, rehearing denied, 325 U. S. 894	9

Statute:

Selective Training and Service Act of 1940, Sec. 11, 50 U. S. C. App. 311	10

702735—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 183

RALPH HENRY CAHOON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the circuit court of appeals (R. 239–240) is reported at 152 F. 2d 752. Its opinion upon petition for rehearing (R. 261–263) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 9, 1946 (R. 241), and a petition for rehearing (R. 242–249) was denied on April 25, 1946 (R. 263).[1] On May 23, 1946,

[1] The time to file the petition for rehearing was extended by the court below to 15 days after the decision of this Court in *Estep* v. *United States*, Nos. 66 and 292, O. T. 1945, decided February 4, 1946 (R. 241).

the time for filing a petition for a writ of certiorari was extended to and including June 15, 1946, by order of Mr. Justice Black (R. 264). The petition was filed on June 13, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTIONS PRESENTED

1. Whether petitioner, who did not report to the induction station and was never found acceptable for service, may challenge the propriety of his Selective Service classification as a defense in his criminal trial for failing to report for induction.

2. Whether a registrant's belief that he should have been exempted as a minister of religion is a valid defense to a charge of "knowingly" failing to comply with an order to report for induction.

STATEMENT

On January 10, 1945, petitioner was indicted in the United States District Court for the Southern District of Texas for failing to report and submit himself to induction into the armed forces of the United States, in violation of the Selective Training and Service Act of 1940 (R. 8–9). After a trial by jury, petitioner was convicted (R. 226–227), and was sentenced to imprisonment for 13 months (R. 228). Upon appeal to the Circuit

Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 241, 263).

At his trial petitioner predicated his defense on the ground that he was a minister of religion and that he had been improperly denied classification as such. He was permitted to adduce evidence in support of this contention (see R. 26–214).

The evidence in support of the judgment may be briefly summarized as follows:

Petitioner, a citizen of the United States (R. 34), registered under the Selective Training and Service Act of 1940 on October 4, 1943, with Local Board No. 9, Houston, Texas (R. 15). He executed his Selective Service questionnaire on October 6, 1943 (R. 29). In this questionnaire, petitioner stated that he was born on October 2, 1925 (R. 34); that his occupation was (a) preaching the Gospel from house to house and on the streets, conducting Bible studies and distributing Bible literature, and (b) working as a stock clerk in a local dry goods establishment (R. 30); that he earned nothing from his first occupational activity but averaged $25 weekly from the second (R. 30); that he was a minister of the Jehovah's Witnesses and had been since August 1, 1936,[2] but had not been formally ordained; that he was a student preparing for the ministry at the School of Theocratic Ministry in Houston, which was established after September 16, 1939 (R. 34); and that he

[2] At this date petitioner was less than eleven years of age.

was a conscientious objector to war (R. 34). Thereafter, on October 16, 1943, petitioner filed the Special Form for Conscientious Objector with the local board (R. 49, 50–53) and with it filed a personal statement (R. 38–39) and an affidavit of K. K. Records, a company servant of the North Unit—Houston, Texas, Company of Jehovah Witnesses, dated October 12, 1943 (R. 48–49), both of which were designed to support petitioner's claim to classification in IV–D as a minister of religion.

On October 28, 1943, the local board by unanimous vote classified petitioner I–A–O (conscientious objector available for noncombatant military service) (R. 36, 16). Thereafter, on November 11, 1943, petitioner made a statement to the board urging his reclassification to IV–D (R. 54–56). A minute entry on his questionnaire states "11–11–43 Reviewed and retained in IA" (R. 36, 42, 44, 100–101, 122).[3] Petitioner ap-

[3] Contrary to petitioner's statement that he was originally so classified on October 28, 1943 (Pet. 8). In this connection the report of the Department of Justice Hearing Officer states (R. 42):

"On Registrant's DSS Form 40 it appears that by unanimous action of the Local Board registrant was put in Class I–A. In a memorandum found in the file under date of November 11, 1943, not signed by any member of the Local Board, it is stated that registrant was placed in Class IAO but desired said classification changed to IV–D, but that the facts did not warrant such a change. In another letter, dated November 12, 1942, Willie G. Dyer, Clerk of the Local Board No. 9, states that registrant was appealing from the IAO

pealed to his board of appeal and was unanimously classified I–A by that board on August 28, 1944 (R. 36, 100–101, 122), after the board had referred the matter to a Department of Justice Hearing Officer and received a report showing that petitioner would refuse a conscientious objector's classification and would accept only a classification as a minister of religion (R. 42, 44, 99–100). Petitioner was given a preinduction physical examination and on October 17, 1944, he was certified as physically fit for general military service.[4] On December 5, 1944, petitioner was ordered to report for induction on December 15, 1944 (R. 23).

On the morning of December 15, petitioner reported to his local board. It is clear from the record that petitioner never went from the draft board to the induction station despite the statement in the petition for a writ of certiorari (pp. 28–29) that—

> It is presumed that there was a regularity of administrative proceedings follow-

classification given by the Board on October 28, 1943. As near as the facts can be ascertained, this registrant was originally placed in IAO by the Local Board and registrant then appealed, but before the Appeal Board passed on the appeal the file was returned to the Local Board, which placed registrant in Class I–A because registrant declined to accept either a IAO classification or a IV–E classification as he claimed to be a minister and entitled to a IV–D classification.

[4] This information has been obtained from petitioner's selective service file.

ing the issuance of the order to report for induction and that the petitioner complied with Sections 623.21 and 633.22 and reached the point where he could be required to submit to induction, because unless he was ever ordered to submit to induction it cannot be said that he refused to submit to induction.

There is nothing in the record to dispute the statements of the various witnesses and the documents that petitioner refused to submit to induction and that he was duly accepted for training and service. It is at least enough evidence to warrant this Court in holding that the petitioner did precisely as did Estep and Smith.

It clearly appears from the record, however, that petitioner's refusal to be inducted was made at the draft board and that in view thereof, he was never sent to the induction center (see R. 17–18, 61, 68–69, 78; see also R. 85). At petitioner's request, an affidavit taken from his selective service file was introduced in evidence at the trial, which read as follows (R. 18):

HOUSTON, TEXAS,
December 15, 1944.

To Whom it May Concern:

This is to certify that Ralph Henry Cahoon, Jr., who was ordered to report for induction on December 15, 1944, at 8:00 o'clock, did present himself at this Board at the specified time.

He refused, however, to be inducted, for the reason that he has conscientious scruples against serving in the armed forces, and he claims exemption as a minister of the gospel.

HENRIETTA A. ROLLFING,
Asst. Clerk, Local Board #9.

There is nothing in the record or in petitioner's selective service file, which we have examined, to show that his acceptability for service was finally determined by the armed forces. To the contrary, as the Department's files confirm, he refused to proceed to the induction center where such a determination would have been made.

ARGUMENT

1. The first eight questions raised by the petition (Pet. 2–4) all go to the propriety of the action of the Selective Service boards in classifying petitioner I–A contrary to his claim that he should have been given a classification exempting him as a minister of religion. Relying upon the decision of this Court in the *Estep* and *Smith* cases, Nos. 292 and 66, O. T. 1945, decided February 4, 1946, petitioner argues that he had exhausted the administrative process to the point where in this criminal prosecution he could and did offer as a valid defense (1) that there was no factual basis for the classification given him with the result that the actions of the local and appeal boards were beyond their jurisdiction (Pet. 23–26), and (2) that the appeal board

denied him due process in considering information outside the record and basing its determination on a preconceived bias against Jehovah's Witnesses (Pet. 17–23).

While we believe that these contentions are without substance,[5] it is unnecessary, we submit, to give consideration to them here. Contrary to petitioner's assertions, he did in fact fail to exhaust all of the administrative steps and hence was not entitled to challenge the validity of the Selective Service action in this criminal proceeding. Petitioner clearly falls within the ruling in the *Falbo* case, 320 U. S. 549. In that case the registrant had been classified as a conscientious objector, passed a pre-induction physical examination, and was ordered to report for work of national importance. He failed to report. Since he still might have been rejected by the Civilian Public Service Camp to which he was assigned, this Court held that he had failed to exhaust his administrative remedies and was therefore foreclosed from challenging the classification in the criminal trial. This Court reaffirmed that decision in the *Estep* case (slip opinion, p. 7). The petitioner here is in a similar position. Although

[5] As appears from the opinion below on rehearing (R. 261–263), petitioner was given full opportunity in the trial court to support these contentions. In his charge to the jury, the trial judge instructed them that on the basis of the evidence so adduced, petitioner "did have before the Board a legal and constitutional hearing" (R. 221). The action of the trial court in this regard was approved by the court below (R. 262–263).

he had had a pre-induction physical examination, he did not report to the induction station and go through all of the administrative steps short of actual induction so as to bring himself within the *Estep* rule. The induction order on its face required him to report to the local board to be transported to the induction station for processing (R. 23). Because of his refusal at the local board to proceed further, he never reached the induction station or there underwent the processing—physical, mental, and otherwise—by which his acceptability to the armed forces might have been finally determined.[6] Compare the facts in *Estep* v. *United States, supra* (slip opinion, pp. 2–3). In fact, petitioner had gone through far less of the administrative process than had the petitioner in *United States* v. *Rinko,* 147 F. 2d 1 (C. C. A. 7), certiorari denied, 325 U. S. 851, rehearing denied, 325 U. S. 894. Rinko had reported to the induction station and had there undergone a part of the processing, but he withdrew from the processing before his final acceptability was determined by the Army.[7] Petitioner, like

[6] The induction order reads in part (R. 23):

"This local board will furnish transportation to an induction station. You will then be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

"Persons reporting to the induction station in some instances may be rejected for physical or other reasons."

[7] For discussion of this point see pp. 5–6, 9–10 of our Brief in Opposition in the *Rinko* case, No. 1071, October Term, 1944.

Falbo, and more so than Rinko, had stopped short in the administrative process before it could be determined by processing at the induction station whether he was acceptable to the armed forces, and, therefore, he cannot in this proceeding challenge the validity of the Selective Service classification.

2. The only remaining question raised by the petition is whether a registrant's good faith belief that he should have been exempted as a minister of religion is a good defense to the charge that he knowingly, wilfully, and unlawfully refused to comply with the induction order (Pet. 4, 26–28). Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311) makes it a criminal offense for any person charged with a duty under the Act or regulations "knowingly" to fail or neglect to perform that duty. There is no question that petitioner received the order of the local board and that he was aware of his duty to report to the local board for transportation to the induction center and to submit to induction. Nothing more was required to be shown. *Browder* v. *United States,* 312 U. S. 335, 340–342; *United States* v. *Illinois Central R. R. Co.,* 303 U. S. 239, 242–243; cf. *Falbo* v. *United States, supra.* And it is no defense that the offense knowingly and intentionally committed was not done with a

bad motive.[8] See *Gates* v. *United States,* 122 F. 2d 571, 575 (C. C. A. 10), certiorari denied, 314 U. S. 698. Hence, evidence that petitioner was motivated by religious beliefs or personal convictions that the duty was wrongfully imposed does not divest his failure to report and submit to induction of that quality of wilfulness required by the Act. It follows, therefore, that the trial judge was not in error in refusing petitioner's requested instruction (R. 222, 225–226) that his good faith belief vitiated guilt.

CONCLUSION

The case involves merely the application of well established principles of law to the particular facts of the case, and presents no question requiring further review by this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
SHELDON E. BERNSTEIN,
Attorneys.

JULY 1946.

[8] Petitioner's argument that good faith belief that the order to report is invalid is like the situations where a selectee is prevented from reporting by illness, accident, etc. (Pet. 27), is a *non-sequitur*, since, in the latter cases, the failure is involuntary.

U. S. GOVERNMENT PRINTING OFFICE: 1946